In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1569

JIWAN SINGH, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an alien from India, was originally admitted to this country as a non-immigrant student in January 1959. In 1963 he married an American citizen and applied for adjustment of his status to that of an alien admitted for permanent residence. The application was granted on October 18, 1963. Thereafter, on September 12, 1968, within the five-year period provided by 8 U.S.C. 1256(a), (Pet. 4-5), the Acting District Director mailed to petitioner a letter notifying him that the Immigration and

Naturalization Service intended to rescind his permanent resident status thirty days after receipt of the notice on the ground that petitioner's marriage to an American citizen, which was the basis for his adjustment of status, was a sham (Pet. App. 48-50). The letter further notified petitioner of his right to reply to the charges in writing or request a hearing before a special inquiry officer (Pet. App. 46). On October 11, 1968, petitioner denied the charges and requested a hearing.

At the hearing on December 6, 1968, the special inquiry officer terminated the recission proceeding on the ground that it was barred by 8 U.S.C. 1256(a), which the officer interpreted as requiring that the hearing be held within the five-year limitations period (Pet. App. 39-45). The Service appealed to the Board of Immigration Appeals which reversed, holding that service of a notice of intention to rescind within the five-year limitations period tolled the running of the statute (Pet. App. 28-38).

Petitioner then brought an action for a declaratory judgment in the United States District Court for the Northern District of California to review the decision of the Board. The district court granted summary judgment in favor of petitioner (Pet. App. 18-24). On appeal, the court of appeals reversed in an extensive opinion, holding, like the Board of Immigration Appeals, that the service of a notice of intention to rescind within the limitations period tolled the statute. (Pet. App. 1-11).

Petitioner's central contention is that 8 U.S.C. 1256(a) requires that the hearing before, and determination by, the special inquiry officer be completed within five years of the adjustment of status, and that the service of the notice of intention to rescind is ineffective to toll the limitations period. This issue was fully canvassed and properly resolved in the opinions of the court of appeals on which we principally rely.

Petitioner suggests that there is a conflict between the decision below and *Quintana* v. *Holland*, 255 F.2d 161 (C.A. 3). We note, as did the court below in distinguishing that case, that *Quintana* was decided under a wholly different—and now superseded—regulatory scheme, and that the considerations which moved the Third Circuit in that case do not apply under the current regulations. The current regulations, modelled on rules of court procedure, separate the prosecutorial duties of the district director from the fact-finding functions of the special inquiry officer (see 8 C.F.R. 246; Pet. App. L, pp. 51-57). Under the regulations in effect when *Quintana* was decided, the alien, served by the district director with a notice of intention to rescind, could request a "personal appearance" before an immigration officer who then "report[ed] and recommend[ed]" to the district director (8 C.F.R. 246, 19 F.R. 9179 (December 24, 1954); Pet. App. M, pp. 58-61). Under those regulations the same individual who initiated the proceeding determined its outcome. Thus, as the court below observed, the district director could avoid

the limitations statute altogether by filing a premature notice and protracting the proceeding to complete his investigations. The current regulations avoid this difficulty by putting the management of the "litigation" in control of an independent fact finder.

Quintana is therefore of dubious validity even in the Circuit which decided the case. This Court need not attempt to resolve a conflict which may not exist.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

CERTIORARI DENIED

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